

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DERRICK DESHAWN CARTER,

Petitioner,

CRIMINAL CASE NO. 93-50024-02

v.

UNITED STATES OF AMERICA,

HONORABLE PAUL V. GADOLA
U.S. DISTRICT COURT

Respondent.

**ORDER DENYING MOTIONS FOR A CERTIFICATE OF APPEALABILITY
AND FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS**

Before the Court are Petitioner's motion for a certificate of appealability and his motion for leave to proceed on appeal *in forma pauperis*, both filed on June 2, 2005. On September 10, 2001, this Court denied Petitioner's motion to vacate sentence under 28 U.S.C. § 2255. On April 18, 2005, Petitioner filed a motion for relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b). The Court normally considers such a motion for relief from judgment to be a second, successive motion to vacate sentence. *See* *Castro v. United States*, 540 U.S. 375, 377 (2003). However, in his motion, Petitioner explicitly argued that it should not be construed as a second, successive motion to vacate sentence. The Court, therefore, addressed the motion to the extent that it was brought properly under Rule 60(b), and denied the motion on May 10, 2005. Generally, a certificate of appealability is not required for an appeal of a Rule 60(b) motion. Nevertheless, in this case, because Petitioner's motion seeks relief from the denial of a § 2255 proceeding, a certificate of appealability is required before an appeal of that motion for relief from judgment can be taken to the Circuit Court of Appeals. *See* 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a

certificate of appealability, an appeal may not be taken to the court of appeals from . . . (B) the final order in a proceeding under section 2255.”).

A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Petitioner argues that a certificate of appealability should be granted because reasonable jurists could find the Court’s May 10, 2005 decision on Petitioner’s motion for relief from judgment to be debateable or wrong. The Court disagrees with Petitioner, and finds that the arguments raised by Petitioner are not debateable as to substantially show the denial of a constitutional right. Accordingly, the Court **DENIES** Petitioner’s motion for a certificate of appealability. Given this determination, the Court also **DENIES AS MOOT** Petitioner’s motion for leave to proceed on appeal *in forma pauperis*. See Fed. R. App. P. 24(a).

SO ORDERED.

Dated: December 6, 2005

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on December 6, 2005, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Mark C. Jones, and I
hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Derrick Deshawn Carter.

s/Ruth A. Brissaud
Ruth A. Brissaud, Case Manager
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